No. 98-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, et al.,
PETITIONERS,

- vs -

MICHAEL EMERSON CORRELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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6022406697 MUCHMORE & WALLWORK 844 P02 SEP 15 '98 14:36

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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWARD, et al., Petitioners, vs MICHAEL EMERSON CORRELL, Respondent.	NO. 98-222 MOTION TO PROCEED *IN FORMA PAUPERIS*

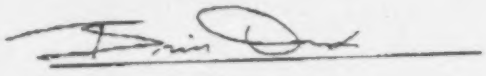
Respondent/Cross-Petitioner Michael Emerson Correll hereby requests leave of this Court to proceed *in forma pauperis*. Leave to proceed *in forma pauperis* was sought at the District level and granted on September 30, 1987.

Undersigned counsel, BRIAN R. DANDO was appointed pursuant to the Criminal Justice Act of 1964 on December 8, 1987.

This Motion is submitted in accordance with Rule 39 of the Rules of the Supreme Court of the United States. Michael Emerson Correll requests that he be allowed to proceed pursuant to the relaxed filing requirements of that rule – with regard to both his Brief in Opposition and his Cross-Petition, both of which pleadings are submitted simultaneously with this motion.

602240669? MUCHMORE & WHLLWORK 844 P03 SEP 15 '98 14:37

RESPECTFULLY SUBMITTED this 2nd day of September, 1998.



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6022406697 MUCHMORE & WRLLWORK 844 P04 SEP 15 '98 14:37

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit has properly ordered a federal evidentiary hearing for a state inmate, who has presented a colorable claim that he was denied effective assistance of counsel at sentencing, but who was denied an opportunity to develop his claims or to present evidence at a state court hearing?

2. Whether refusal of a state court to permit development or presentation of a constitutional claim, deemed colorable by the Ninth Circuit, can constitute "cause", allowing fuller presentation of that claim at a federal evidentiary hearing?

6022406697 MUCHMORE & WRLLWORK 844 P05 SEP 15 '98 14:37

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT ISSUE 2

I.

THE NINTH CIRCUIT'S DECISION TO ALLOW A FEDERAL EVIDENTIARY HEARING ON ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS CONSISTENT WITH FEDERAL ANALYSIS AND CASE LAW 4

II.

NINTH CIRCUIT PROPERLY DETERMINED THAT MICHAEL CORRELL HAD NO MEANINGFUL OPPORTUNITY TO PRESENT HIS INEFFECTIVENESS CLAIMS ON THE ISSUE OF SENTENCING TO THE STATE COURT THEREFORE DEMONSTRATING "CAUSE" 9

CONCLUSION 12

6022406697 MUCHMORE & WALLWORK 844 P06 SEP 15 '98 14:38

TABLE OF AUTHORITIES

CASES **PAGE**

Bannister v. Armontrout,
4 F.3d 1434 (8th Cir. 1993), *cert. denied*, 115 S.Ct. 418 (1994) 7

Demarest v. Price,
130 F.3d 922 (10th Cir. 1997) 7

Jones v. Woods,
114 F.3d 1002 (9th Cir. 1997) 6, 8

Keeney v. Tamayo-Reyes,
112 S.Ct. 1715 (1992) 3, 4, 5, 6, 8

Lawson v. Borg,
60 F.3d 608 (9th Cir. 1995) 8

Livingston v. Johnson,
107 F.3d 297 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 204 (1997) 7

Mathis v. Zant,
975 F.2d 1493 (11th Cir. 1992) 7

Murray v. Carrier,
477 U.S. 478, (1984) 9

Siripongs v. Calderon,
35 F.3d 1308 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1175 (1995) 8

Strickland v. Washington,
466 U.S. 668 (1984) 2, 5, 6

Toney v. Gammon,
79 F.3d 693, 697 (8th Cir. 1996) 7

Turner v. Johnson,
106 F.3d 1178 (5th Cir. 1997) 7, 11, 12

Wilson v. Kemna,
12 F.3d 145 (8th Cir. 1994) 8

6022406697 MUCHMORE & WALLWORK 844 P01 SEP 13 98 14:35

STATUTES

AEDPA (Anti-Terrorism and Effective Death Penalty Act of 1996) 8

28 U.S.C. § 2254(d) 7

A.R.S. §13-4013 (B) 11

RULES

Rule 11 Ariz. R. Crim. P. 10

Rule 32 Ariz. R. Crim. P. 4, 5, 9

602240669? MUCHMORE & WALLWORK

844 P08 SEP 15 '98 14:58

STATEMENT OF THE CASE[1]

On January 27, 1987, Michael Correll, acting pro per (with limited advice of unappointed counsel), filed a timely petition for post-conviction relief (PCR). Among the claims raised, Mr. Correll alleged that his trial counsel provided him constitutionally inadequate representation at the sentencing phase of his trial. (Petitioner's App. at D-1, 2). After appointment of PCR counsel, on or about April 10, 1987, additional pleadings were submitted, supplementing the PCR petition. Through pleadings, post-conviction counsel sought a stay of execution, additional time to develop Mr. Correll's claims, an evidentiary hearing, appointment of an investigator and appointment of a mental health expert. (Petitioner's App. at E, H, I, J). The post-conviction pleadings emphasized that trial counsel had presented no mitigation evidence at sentencing, that between trial and sentencing Mr. Correll conferred with counsel for only approximately five minutes, that in his youth, Mr. Correll had twice been committed to mental hospitals, and suffered from a long history of mental health problems. (*Id.*, *see also*, Affidavit of Correll, Petitioner's App. at G).

Although post-conviction counsel complained of a lack of any mental health evaluation, and documented his difficulty in obtaining records, the state court on May 14, 1987 summarily dismissed the petition and denied the stay of execution, denied additional time, denied an evidentiary hearing, denied appointment of an investigator and mental health expert. (Separate Appendix of Respondent – "App." at A-1 - A-3)

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[1] Respondent concurs with the recitations in the Petition for Writ of Certiorari with regard to the "Opinion Below", the "Statement of Jurisdiction", and the "Provisions Involved".

6022406697 MUCHMORE & WALLWORK 844 P09 SEP 15 '98 14:39

Faced with this procedural history, the Ninth Circuit determined that Mr. Correll had presented a colorable claim of ineffective assistance of counsel (at sentencing) to the state court. It further determined that Mr. Correll is entitled to a federal evidentiary hearing on those ineffectiveness claims, because he was denied any meaningful opportunity to develop or present his claims to the state.

A portion of the court's analysis is set forth below:

> Correll's allegations, if taken as true, constitute a colorable claim of ineffective assistance of counsel. Correll asserts that during the month that elapsed between the jury verdict and the pre-sentencing hearing, his attorney met with him for just five minutes. Furthermore, the seven-page response to the state's sentencing memorandum that Correll's attorney submitted before the pre-sentencing hearing devoted barely a page to listing mitigating circumstances, virtually bare of any supporting evidence.
>
> Similarly, the transcript of the pre-sentencing hearing reveals that Correll's attorney failed to call witnesses or present any evidence at the pre-sentencing hearing, although he stated on the record that he knew of people who were willing to testify on Correll's behalf. Neither in the pre-sentencing memorandum nor during the pre-sentencing hearing did Correll's attorney raise Correll's psychiatric history or condition at the time of the crimes as a potential mitigating factor, apart from alluding in passing to the fact that Correll's parents had abandoned him when he was fourteen years old. This almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition at the time of the murders, constitutes deficient performance "outside the wide range of professionally competent assistance." *Strickland* 466 U.S. at 690.

(Petitioner's App. at A 1988-89).

The Ninth Circuit determined Mr. Correll should be permitted to introduce evidence of ineffectiveness, that was not presented to the state court, because the "cause"

844 P10 SEP 15 '98 14:39 MUCHMORE & WRLLWORK 6022408697

requirement, as discussed in the case of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992), was met: The actions of the state court, in denying an evidentiary hearing and the opportunity to develop evidence "divested Correll of any meaningful opportunity to present this evidence at the state level". (*Id.* at 1991).

In concluding that an evidentiary hearing is required on the issue of ineffective assistance at sentencing, the Ninth Circuit rejected the state's argument that Mr. Correll should be "absolutely barred from seeking a federal evidentiary hearing if the material facts had not been developed in state court". (Petitioner's App. at A 1992) Instead, the court recognized that the "cause" prong of *Tamayo-Reyes* only requires a habeas petitioner to provide an adequate reason why the material facts were not developed in state court. It would not bar presentation of unpresented evidence if "cause" were found. The court determined that the rationale of the state's position sharply conflicted with the analysis of *Tamayo-Reyes:*

> Obviously, this interpretation would render the *Tamayo-Reyes* cause and prejudice rule entirely superfluous. Again, the state's logic is circular. It would serve no purpose to require the petitioner to explain a failure to develop material facts in state court if he or she were procedurally barred for failure to develop material facts. In claiming that the prerequisite to the cause and prejudice rule is the full development of facts in state court proceedings, the state turns the *Tamayo-Reyes* decision on its head.

(*Id. at 1993*). The Ninth Circuit warned that the state's position – calling for an additional showing of "evidence exhaustion" – would lead a petitioner into a "federal habeas cul-de-sac", because there could be no relief under *Tamayo-Reyes* for failure to develop a claim if, as a prerequisite to showing "cause and prejudice", all evidence must be fully developed at the state level. (*See,* Petitioner's App. at A 1992-1993)

844 P11 SEP 15 '98 14:40 6022406697 MUCHMORE & WRLLWORK

REASONS WHY THE WRIT SHOULD NOT ISSUE[2]

I.

THE NINTH CIRCUIT'S DECISION TO ALLOW A FEDERAL EVIDENTIARY HEARING ON ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS CONSISTENT WITH FEDERAL ANALYSIS AND CASE LAW.

As noted above, the Ninth Circuit found that Respondent Michael Correll had properly raised a colorable claim – that he was denied effective counsel at his sentencing – in his state post-conviction Rule 32 hearing. The appellate court also found that the state court had refused to allow Mr. Correll to develop his colorable claim, that it refused to consider any mental health evidence which might have been developed, and it denied an evidentiary hearing. Under these circumstances, the Ninth Circuit ruled that Mr. Correll would be entitled to a federal evidentiary hearing. (*Id.*) This conclusion is consistent with the U.S. Supreme Court case of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

The specific petitioner in *Tamayo-Reyes* was denied a federal hearing, because he was given an opportunity to develop his claim in state court and failed to do so. Under *Tamayo-Reyes*, a petitioner has an obligation to raise evidence of his federal claims, when given an opportunity to do so – however, the obligation also extends to the state, which must afford this opportunity:

> just as the state must afford the petitioner a full and fair hearing on its federal claim, so must the petitioner afford the state a full and fair opportunity to address and resolve the claims on the merits.

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[2] Simultaneously with this Brief in Opposition, Respondent is filing a Cross-Petition seeking issuance of a Writ on other issues decided in the Ninth Circuit Opinion; however, regarding the issues raised in the state's Petition, Respondent submits that a Writ should not issue

844 P12 SEP 15 '98 14:40 6022406697 MUCHMORE & WRLLWORK

(112 S. Ct. at 1720). Here, by contrast, where a federal petitioner has been denied the opportunity to develop and present his claims, the case of *Tamayo-Reyes* supports the Ninth Circuit's conclusion that a federal evidentiary hearing is warranted.

The Petition for Writ of Certiorari filed by the State of Arizona strains to paint the Ninth Circuit decision as a departure from the traditional *Tamayo-Reyes* analysis – the state's effort include mischaracterization of facts. Specifically, the state suggests that certain evidence of ineffectiveness of counsel (newly developed at the federal level in support of the habeas corpus petition) played a role in the Ninth Circuit decision to provide a federal evidentiary hearing.[3] This was not the case. Based entirely on a review of materials available to and presented to the state court at the Rule 32 proceedings, the Ninth Circuit concluded that the ineffective assistance of counsel claim regarding sentencing was colorable.

The court noted that the state court procedural history was "replete with Correll's assiduous attempts to develop the theory that his counsel provided ineffective assistance at sentencing". Evidence provided to the state court included a record showing that counsel failed to investigate and present available mitigating evidence at sentencing, including evidence of mental health history and psychiatric condition, and that counsel failed to request a mental health diagnostic examination, even though he earlier challenged his client's competency to stand trial. The record at the Rule 32 proceeding further reflected

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[3] The state makes several references to evidence which the state had no opportunity to review, and at one point concludes "it was only after Correll filed his federal petition that he offered the Affidavits of the two psychiatric doctors that could possibly constitute a colorable showing of prejudice under *Strickland*." (Petition at 12). But the Ninth Circuit did not consider the supplemental record, offered as evidence at the federal district court, in finding the ineffectiveness claim colorable

6022406697 MUCHMORE & WHELLWORK

that Mr. Correll had twice been committed to mental health facilities and that he had suffered from a "lengthy mental health history dating from his early teen years". In summation, the court concluded that Mr. Correll had presented a colorable claim under *Strickland*. (Petitioner's App. at A 1988-1991)

Respondent Correll emphasizes this point because it demonstrates that the state was given an ample opportunity to consider the issues of ineffective assistance of counsel at sentencing, but refused to grant factual development or an evidentiary hearing. The Ninth Circuit compared this case to the matter of *Jones v. Woods*, 114 F.3d 1002, 1012 (9th Cir. 1997) in which the accused "tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claims at the state court level in the only permissible manner." In Mr. Correll's case, the court concluded that a federal evidentiary hearing was warranted, stating.

> Indeed, the actions of the state court divested Correll of any meaningful opportunity to present this evidence at the state level.
>
> Accordingly, the state cannot now insist the obstacle it placed in Correll's path when he sought a state-court hearing and the means to present evidence at that hearing should again prevent Correll from securing a federal evidentiary hearing.

(Petitioner's App. at A 1991).

The cases cited by the state from other circuits do not demonstrate a divergence of federal opinion on this issue. The inquiry under *Tamayo-Reyes* consistently asks whether the state court's proceedings fairly and adequately developed the facts. If the accused is

6022406697 MUCHMORE & WRLLWORK 844 P14 SEP 15 '98 14:41

responsible for failure to present his factual basis in state courts, then a federal hearing may not be granted. The cases cited by Petitioner merely recognize this analysis.

Most of the state's citations involve cases where a full court hearing was held, and the habeas petitioner failed to put forth the facts he subsequently attempted to advance in federal court. Under such circumstances, where the petitioner is responsible for the failure to develop the facts, Tamayo-Reyes may bar a federal hearing. See e.g. *Demarest v. Price*, 130 F.3d 922 (10th Cir. 1997) (The state court conducted a post-conviction relief evidentiary hearing at which witnesses were called); *Bannister v. Armontrout*, 4 F.3d 1434 (8th Cir. 1993) (State court held a pretrial hearing on the suppression claim during which those involved testified); *Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992) (State court held an evidentiary hearing on the ineffective assistance of counsel claim and made findings, presumed correct under § 2254(d), that trial court strategy decisions were reasonable); *Turner v. Johnson*, 106 F.3d 1178 (5th Cir. 1997) (Petitioner was given two full post-conviction evidentiary hearings at state court, one of which the court described as "full blown"); *Livingston v. Johnson*, 107 F.3d 297 (5th Cir. 1997) (Although the hearing did not involve live testimony, a hearing was held which was deemed adequate, full and fair, and which resulted in an extensive finding of facts and conclusions of law by the judge.) In each of these cases cited by the state, the petitioner was deemed to have failed to develop his facts, and therefore was not entitled to a federal hearing.

Significantly, the federal courts are also consistent in finding that an evidentiary hearing is warranted in situations where factual development has been denied at the state level, through no fault of the habeas petitioner. See e.g. *Toney v. Gammon*, 79 F.3d 693, 697 (8th Cir. 1996) ("Generally, a habeas petitioner is entitled to an evidentiary hearing in

6022406697 MUCHMORE & WALLWORK

federal court if the petition 'alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing.' *Wilson v. Kemna*, 12 F.3d 145, 146 (8th Cir. 1994)"); *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) ("In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary in federal court."); *Jones v. Woods*, 114 F.3d 1002, 1013 (1997) ("Where, as here, the state court simply failed to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); *Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995) (Federal evidentiary hearing was appropriate where state trial court refused to hold an evidentiary hearing and instead resolved factual issues of jury misconduct solely on contradictory declarations submitted by the parties).

In summation, the Ninth Circuit decision simply applies the rationale of *Tamayo-Reyes* to determine that Mr. Correll is entitled to a federal evidentiary hearing in this case, where he was denied the opportunity to develop and present his ineffectiveness claims at the state level.[4]

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[4] The state makes much of a footnote in the Ninth Circuit opinion which indicates that *Tamayo-Reyes* does not equate "evidence exhaustion" to "claim exhaustion". (Petition at 10). That footnote does not deviate from the *Tamayo-Reyes* analysis; rather, the Ninth Circuit simply recognizes that failure to fully present a factual presentation at the state court is not an automatic procedural bar to consideration of new evidence at the federal level. Instead, the federal courts must ask why those material facts were not developed before determining if a federal evidentiary hearing is warranted. (Petitioner's App. at A 1992)

6022406697 MUCHMORE & WELLWORK 844 P16 SEP 15 '98 14:42

II.

NINTH CIRCUIT PROPERLY DETERMINED THAT MICHAEL CORRELL HAD NO MEANINGFUL OPPORTUNITY TO PRESENT HIS INEFFECTIVENESS CLAIMS ON THE ISSUE OF SENTENCING TO THE STATE COURT THEREFORE DEMONSTRATING "CAUSE".

As the state's Petition indicates, "cause" has been defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1984). The Ninth Circuit has applied this rule to this case, and determined that Mr. Correll has been denied the opportunity to develop and present his claims in a state hearing, after having demonstrated a colorable claim on ineffective assistance of counsel during sentencing. The Ninth Circuit finding, that "cause" exists for proceeding with federal evidentiary hearing, is consistent with the federal standard, and with the record on appeal.

The record clearly indicates that PCR counsel for Mr. Correll made repeated attempts through Rule 32 pleadings to obtain an evidentiary hearing and expert assistance. Counsel also requested additional time to prepare and develop his claims. All efforts to present and develop the claim were thwarted. (*See generally*, Statement of the Case, *supra)*. The state court denied all requests and summarily dismissed the Petition for Post-Conviction Relief in a Minute Entry of May 14, 1987. This Minute Entry clearly reflects an unwillingness on the part of the state court judge to entertain the claim set forth by Mr. Correll: The court concluded that there could be no showing of ineffectiveness because the judge specifically recalled that trial counsel had been competent:

> In this respect, the court specifically recalls that the trial work of defense counsel was precise, careful, and competent, and manifested strategic and tactical judgments of the same high quality.

602240669? MUCHMORE & WRLLWORK 844 P17 SEP 15 '98 14:42

(App. at A-2). This personal judgment was rendered despite the fact that trial counsel failed to present any witness or any evidence of mitigation at the time of sentencing. The state court further reflected that it would not be influenced by any new evidence that investigation might uncover, especially with regard to mental health evidence, because it decided that all such evidence would be superseded by an earlier pre- competency screening:

> The Motions for Appointment of Investigator and Expert are DENIED. There is no suggestion that any information not available for presentation to the Court in prior proceedings would become available, or, if it did, that it could in any way have influenced the tribunals to which it might have been presented. The mental health materials Petitioner describes in his present pleadings were dated and superseded by contemporaneous Rule 11 proceedings.

(Id.)

The Ninth Circuit recognized that by the time this Minute Entry was entered, Mr. Correll had made a sufficient showing of ineffectiveness to present a colorable claim, warranting an evidentiary hearing. The blame for any failure to develop the specific evidence rests on the state court judge who refused to grant either the hearing or the investigative and expert funding to allow Mr. Correll to pursue his colorable constitutional claim.[5]

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[5] As rebuttal, the state points out that the PCR pleadings did not have as complete and detailed information regarding Mr. Correll's mental health condition as was subsequently presented to the federal court. However, in arguing that the state petition should have been packed with specific facts, affidavit and proof, the state fails to acknowledge that the lack of specificity was caused by the state court's refusal to fund investigation and experts, and to allow Mr. Correll to proceed with an evidentiary hearing. At the post-conviction relief stage, Petitioner proffered his known claims and proffered what support he could muster given his indigent situation and his incarceration

602240669? MUCHMORE & WRLLWORK 844 P18 SEP 15 '98 14:43

The issue of "cause" is really one of opportunity – here, Mr. Correll had no opportunity to present his claims at the state court level. At the state court proceedings, Mr. Correll's counsel argued vehemently that he was being denied the opportunity to develop his claims. Post-conviction counsel made this point directly to the PCR judge in his Reply in Support of Post-Conviction Relief:

> If in fact there has been such failure so far [to document evidence of mitigation], it is attributable to the Court's refusal to grant Petitioner's motion (April 10, 1987) for appointment of a mental health expert to assist in gathering and presenting such evidence. Under A.R.S. §13-4013(B) such appointment is mandatory when requested, but has not been done. . . .
>
> At this point, Petitioner is simply trying to accomplish what should have been accomplished before he was sentenced – to have the Court order an examination to explore Petitioner's social and psychological history so that the Court will have full information upon which to base a rational sentencing decision.

(App. at B 12-13). Despite this plea, the trial judge summarily denied the allegations of ineffective assistance, as not stating a colorable claim – even though he had before him the trial record, in which virtually no defense was offered at the penalty phase of trial. The actions of the state court barred factual development and constitute "cause".

In the cases cited by the state, the factors offered by defendants as "cause" were not considered external, because the defendants themselves were responsible for failure to develop the claim. For example in *Turner v. Johnson*, 106 F.3d 1178, 1184 (5th Cir. 1997), the court found defendant was responsible for failure to present his federally proffered evidence:

> In so far as Turner is unable to show that the state evidentiary hearings were anything other than full and fair, we must determine whether cause and prejudice exist for Turner's

6022406697 MUCHMORE & WALLWORK 844 P19 SEP 13 '96 14:43

> failure to present the proffered evidence, . . . Neither Turner nor the record suggest that "some objective factor external to defense impeded counsel's effort to develop the evidence". [citation omitted]

The instant case stands in sharp contrast. Here, the Ninth Circuit has determined that the "actions of the state court divested Correll of any meaningful opportunity to present his evidence at the state level" (Petitioner' App. at A 1991). Having improperly denied a hearing on a colorable claim of ineffective assistance, the state should not be allowed to again impede Mr. Correll, when given his first opportunity to present his constitutional claim at a federal evidentiary hearing.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent Michael Correll respectfully requests that this Court decline to issue a writ on the issues raised in the Petition, or requests in the alternative that this Court, affirm the opinion of the Ninth Circuit Court of Appeals, granting Michael Correll an evidentiary hearing on his claims of ineffective assistance of counsel at sentencing.

RESPECTFULLY SUBMITTED this 2nd day of September, 1998.

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6022406697 MUCHMORE & WALLWORK 844 P20 SEP 15 '98 14:43